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Public Prosecutor v Mokbul Hossain & Anor

B COURT OF APPEAL (PUTRAJAYA) — CRIMINAL APPEAL NO W-05–30–02 OF 2021
KAMALUDIN MD SAID, LEE HENG CHEONG AND GHAZALI CHA JJCA
17 JANUARY 2023

C

Criminal Procedure — Forfeiture — Application for — Application for forfeiture of money in bank, car and apartment pursuant to s 56(1) of the Anti-Money Laundering, Anti-Terrorism Financing and Proceeds of Unlawful Activities Act 2001 — Definition of 'the proceeds of an unlawful activity' D *— Definition of 'unlawful activity' — Definition of 'serious offence' — Whether properties were 'the proceeds of an unlawful activity' — Standard of proof applicable — Whether properties ought to be forfeited — Anti-Money Laundering, Anti-Terrorism Financing and Proceeds of Unlawful Activities Act 2001 ss 3(1), 4(1), 56(1), (2), (4) & 70(1) — Anti-Trafficking in Persons and* E *Anti-Smuggling of Migrants Act 2007 s 26A — Passport Act 1966 s 12(1)(h)*

The first respondent was initially charged with the offence under s 26A of the Anti-Trafficking in Persons and Anti-Smuggling of Migrants Act 2007 ('the ATIPSOM') but considering that prima facie case was not established, the first F respondent was acquitted. The charge was then amended to s 12(1)(h) of the Passport Act 1966 and the first respondent pleaded guilty to the amended charge and was sentenced by the High Court. The prosecution ('the appellant') thereafter filed a notice of motion against the respondents pursuant to s 56(1) of the Anti-Money Laundering, Anti-Terrorism Financing and Proceeds of G Unlawful Activities Act 2001 ('the AMLATFPUAA') for the forfeiture of the respondents' monies in Maybank and CIMB Bank, the first respondent's Honda HRV car, and the first respondent's apartment in Bukit Bintang ('the properties') which were seized in relation to a criminal offence of smuggling migrants to Malaysia by obtaining professional work permits improperly by H way of falsifying academic documents, education certificates and also work application documents under s 26A of the ATIPSOM. The appellant contended that they had successfully proven that the properties were the proceeds of an unlawful activity relating to the commission of the offence of money laundering under s 4(1) of the AMLATFPUAA. On the other hand, the I respondents argued that: (a) the properties could not be traced back to the predicate offence as the first and second respondents had received the properties via their businesses; (b) the properties sought to be forfeited were not part of any pecuniary gains from any migrant smuggling; and (c) there was no nexus between the predicate offence and the properties ('the respondents'

contentions'). The learned High Court judge ('the HCJ') rejected the appellant's notice of motion, hence, the present appeal. A

Held, allowing the appellant's appeal, and setting aside the High Court's decision:

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(1) In the context of the present case, what the learned HCJ had to determine was whether the properties were 'the proceeds of an unlawful activity' within the meaning of para (a)(iii) of s 56(2) of AMLATFPUAA and not whether any person had been convicted or acquitted of an offence under s 4(1)(a) of AMLATFPUAA. In determining whether the properties were 'the proceeds of an unlawful activity', the standard of proof to be applied by the judge was the civil standard of proof, ie proof on the balance of probabilities, as stipulated by ss 56(4) and 70(1) of AMLATFPUAA. Thus, if the judge found it to be more probable than not that the properties were derived from a transaction that involved 'the proceeds of an unlawful activity', that would be sufficient for him to make an order of forfeiture under s 56(2) of the AMLATFPUAA. There was no need for him to be satisfied 'beyond any reasonable doubt' that the properties were derived from an 'unlawful activity' (see paras 31–32 & 34). C D E

(2) Based on s 3(1) of AMLATFPUAA, 'unlawful activity' meant 'any activity which is related, directly or indirectly, to any serious offence or any foreign serious offence' and 'proceeds of an unlawful activity' meant 'any property derived or obtained, directly or indirectly, by any person as a result of any unlawful activity'. Section 3 of the AMLATFPUAA interpreted 'serious offence' as 'any of the offences specified in the Second Schedule'. The first respondent was convicted for an offence under s 12(1)(h) of the Passport Act 1966 which indirectly meant that he was guilty of an offense related to illegal activities because such offence was one of the offences specified in the Second Schedule of the AMLATFPUAA. Migrant smuggling was also a 'serious offence' by definition and was therefore an 'unlawful activity' for the purposes of s 56(2)(a)(iii) of the AMLATFPUAA. If any property was derived from any unlawful activity such as the criminal offence of smuggling migrants to Malaysia by obtaining professional work permits improperly by way of falsifying academic documents, education certificates and also work application documents, it must be forfeited, irrespective of whether any person had been convicted or otherwise of the offence of money laundering under s 4(1)(a) of the AMLATFPUAA (see paras 35–36 & 54). F G H I

(3) The court disagreed with the respondents' contentions for the following reasons: (a) the first respondent had been investigated for an offence under s 26A of the ATIPSOM and was convicted of a charge under s 12(1)(h) of the Passport Act 1966; (b) the evidence showed that the first

respondent's income was only RM9,000 per month and the second respondent was in the business of business dealings ie suppliers/wholesalers of textile goods and goods in general, building washing services and construction-related businesses; (c) the second respondent's incomes were substantially in the form of cash; (d) evidence adduced showed that the first respondent's apartment and the Honda HRV were bought substantially in the form of cash generated by the first and second respondents; and (e) since the first respondent could not reasonably and adequately explain the source and frequent flow of cash deposits into his and the second respondent's bank accounts and since the first respondent was investigated for money laundering and convicted under s 12(1)(h) of the Passport Act 1966, it would reasonable to assume that the cash deposits were the proceeds from illegal activities and such proceeds were utilized to purchase and/or acquire the properties. Therefore, the appellant had successfully proved, on the balance of probabilities, that the properties were acquired as a result of illegal activities under s 26A of the ATIPSOM and s 12(1)(h) of the Passport Act 1966 committed by the first and second respondents (see paras 41 & 53).

[Bahasa Malaysia summary

Responden pertama pada mulanya dituduh melakukan kesalahan di bawah s 26A Akta Antipemerdagangan Orang dan Antipenyeludupan Migran 2007 ('ATIPSOM') tetapi memandangkan kes prima facie tidak dibuktikan, responden pertama telah dibebaskan. Pertuduhan tersebut kemudiannya dipinda kepada s 12(1)(h) Akta Pasport 1966 dan responden pertama mengaku bersalah terhadap pertuduhan pindaan tersebut dan dijatuhkan hukuman oleh Mahkamah Tinggi. Setelah itu, pihak pendakwaan ('perayu') memfailkan notis usul terhadap responden-responden menurut s 56(1) Akta Pencegahan Pengubahan Wang Haram, Pencegahan Pembiayaan Keganasan dan Hasil Daripada Aktiviti Haram 2001 ('AMLATFPUAA') untuk pelucuthakan wang responden-responden di Maybank dan CIMB Bank, kereta Honda HRV milik responden pertama, dan pangsapuri responden pertama di Bukit Bintang ('harta tersebut') yang disita berhubung dengan kesalahan jenayah penyeludupan migran ke Malaysia dengan mendapatkan permit kerja profesional secara tidak wajar dengan cara memalsukan dokumen akademik, sijil pendidikan dan juga dokumen permohonan kerja di bawah s 26A ATIPSOM. Perayu berhujah bahawa mereka telah berjaya membuktikan bahawa harta tersebut adalah hasil daripada aktiviti haram yang berkaitan dengan pelakuan kesalahan pengubahan wang haram di bawah s 4(1) AMLATFPUAA. Sebaliknya, responden-responden berhujah bahawa: (a) harta tersebut tersebut tidak dapat dikesan kembali kepada kesalahan predikat kerana responden pertama dan kedua telah menerima harta tersebut melalui perniagaan mereka; (b) harta yang ingin dilucuthakkan bukan sebahagian daripada apa-apa keuntungan kewangan daripada mana-mana

penyeludupan migran; dan (c) tiada perkaitan antara kesalahan predikat dan harta tersebut ('pertikaian responden-responden'). Hakim Mahkamah Tinggi yang bijaksana ('HMT') menolak notis usul perayu, oleh itu, rayuan semasa.

Diputuskan, membenarkan rayuan perayu dan mengenepikan keputusan Mahkamah Tinggi:

(1) Dalam konteks kes ini, perkara yang perlu ditentukan oleh HMT yang bijaksana ialah sama ada harta tersebut adalah 'hasil daripada aktiviti haram' dalam pengertian perenggan (a)(iii) s 56(2) AMLATFPUAA dan bukan sama ada mana-mana orang telah disabitkan atau dibebaskan daripada kesalahan di bawah s 4(1)(a) AMLATFPUAA. Dalam menentukan sama ada harta tersebut adalah 'hasil daripada aktiviti haram', piawaian pembuktian yang akan digunakan oleh hakim adalah piawaian pembuktian sivil, iaitu pembuktian atas imbangan kebarangkalian, seperti yang ditetapkan oleh ss 56(4) dan 70(1) AMLATFPUAA. Oleh itu, jika hakim mendapati ia lebih berkemungkinan daripada tidak bahawa harta tersebut diperoleh daripada urus niaga yang melibatkan 'hasil daripada aktiviti haram', itu sudah memadai baginya untuk membuat perintah pelucuthakan di bawah s 56(2) AMLATFPUAA. Tiada keperluan baginya untuk berpuas hati 'melangkaui apa-apa keraguan munasabah' bahawa harta tersebut adalah hasil daripada 'aktiviti haram' (lihat perenggan 31–32 & 34).

(2) Berdasarkan s 3(1) AMLATFPUAA, 'aktiviti haram' bermaksud 'apa-apa aktiviti yang berkaitan, secara langsung atau tidak langsung, dengan apa-apa kesalahan berat atau mana-mana kesalahan berat asing' dan 'hasil daripada aktiviti haram' bermaksud 'mana-mana harta yang diperoleh atau didapati, secara langsung atau tidak langsung, oleh mana-mana orang daripada apa-apa aktiviti haram'. Seksyen 3 AMLATFPUAA mentafsirkan 'kesalahan berat' sebagai 'mana-mana kesalahan yang dinyatakan dalam Jadual Kedua'. Responden pertama disabitkan dengan kesalahan di bawah s 12(1)(h) Akta Pasport 1966 yang secara tidak langsung bermakna dia melakukan kesalahan berkaitan aktiviti haram kerana kesalahan tersebut merupakan salah satu kesalahan yang dinyatakan dalam Jadual Kedua AMLATFPUAA. Penyeludupan migran juga merupakan 'kesalahan berat' mengikut definisi dan oleh itu merupakan 'aktiviti haram' bagi tujuan s 56(2)(a)(iii) AMLATFPUAA. Jika mana-mana harta diperolehi daripada apa-apa aktiviti haram seperti kesalahan jenayah penyeludupan migran ke Malaysia dengan mendapatkan permit kerja profesional secara tidak wajar dengan cara memalsukan dokumen akademik, sijil pelajaran dan juga dokumen permohonan kerja, ia mesti dilucuthakkan, tidak kira sama ada mana-mana orang telah disabitkan atau sebaliknya atas kesalahan pengubahan wang haram di bawah s 4(1)(a) AMLATFPUAA (lihat perenggan 35–36 & 54).

(3) Mahkamah tidak bersetuju dengan pertikaian responden-responden atas sebab-sebab berikut: (a) responden pertama telah disiasat bagi kesalahan di bawah s 26A ATIPSOM dan disabitkan dengan pertuduhan di bawah s 12(1)(h) Akta Pasport 1966; (b) keterangan menunjukkan bahawa pendapatan responden pertama hanya RM9,000 sebulan dan responden kedua terlibat dalam perniagaan penjualan iaitu pembekal/pemborong barangan tekstil dan barangan secara am, perkhidmatan mencuci bangunan dan perniagaan berkaitan pembinaan; (c) sebahagian besar pendapatan responden kedua adalah dalam bentuk tunai; (d) keterangan yang dikemukakan menunjukkan bahawa pangsapuri responden pertama dan Honda HRV tersebut sebahagian besarnya telah dibeli dalam bentuk tunai yang dijana oleh responden pertama dan kedua; dan (e) memandangkan responden pertama tidak dapat menjelaskan dengan munasabah dan secukupnya punca dan aliran deposit tunai yang kerap ke dalam akaun banknya dan akaun bank responden kedua dan memandangkan responden pertama disiasat kerana pengubahan wang haram dan disabitkan di bawah s 12(1)(h) Akta Pasport 1966, adalah munasabah untuk mengandaikan bahawa deposit tunai tersebut adalah hasil daripada aktiviti haram dan hasil tersebut digunakan untuk membeli dan/atau memperoleh harta tersebut. Oleh itu, perayu telah berjaya membuktikan, diatas imbangan kebarangkalian, bahawa harta tersebut diperoleh hasil daripada aktiviti haram di bawah s 26A ATIPSOM dan s 12(1)(h) Akta Pasport 1966 yang dilakukan oleh yang responden pertama dan responden kedua (lihat perenggan 41 & 53).]

Cases referred to

Ahmad Najib bin Aris v PP [2009] 2 MLJ 613; [2009] 2 CLJ 800, FC (refd)
Dato' Sri Mohd Najib bin Hj Abd Razak v PP [2022] 1 MLJ 137; [2021] 1 LNS 2080, CA (refd)
Miller v Minister of Pensions [1947] 2 All ER 372, KBD (refd)
Mohd Yusri bin Mangsor & Anor v PP and another appeal [2014] 4 MLJ 875; [2014] 7 CLJ 897, CA (refd)
Noor Ismahanum Mohd Ismail v PP [2019] 2 MLJ 536; [2018] 10 CLJ 597, CA (folld)
PP v Azilah bin Hadri & Anor [2015] 1 MLJ 617; [2015] 1 CLJ 579, FC (refd)
PP v Ma'Arif [1969] 2 MLJ 65 (refd)
PP v Wan Razali Kassim [1970] 2 MLJ 79; [1970] 1 LNS 121, FC (refd)

Legislation referred to

Anti-Money Laundering, Anti Terrorism Financing and Proceeds of Unlawful Activities Act 2001 ss 3(1), 4(1), 4(1)(a), 56(1), (1)(a), (1)(b), (1)(c), (1)(d), (2), (2)(a), (2)(a)(i), (2)(a)(ii), (2)(a)(iii), (2)(a)(iv), (4), 70(1), 76, Second Schedule
Anti-Trafficking in Persons and Anti-Smuggling of Migrants Act 2007 ss 26A, 34

Evidence Act 1950 s 103
Passports Act 1966 s 12(1), (1)(h)

Appeal from: *Public Prosecutor v Mokbul Hossain & Ors* [2021] MLJU 169 (High Court, Kuala Lumpur)

Atiqah bt Abdul Karim @ Husaini (Deputy Public Prosecutor, Attorney General's Chambers) for the appellant.
Harpal Singh (with Nadia Syaza bt Rahizam and Putri Noor Syazwani bt Ismadi) (T Harpal & Assoc) for the respondent.

Lee Heng Cheong JCA:

INTRODUCTION

[1] The appellant/applicant had filed a notice of motion dated 13 December 2019 vide the Criminal Application No WA-44–322–12 of 2019 ('the said notice of motion') in the High Court against the first respondent (Mokbul Hossain), the second respondent (Mokbul Enterprise Sdn Bhd) in which the first respondent owned 40% of the total issued capital as well as the third respondent (Md Mithu) for the forfeiture of the following monies and properties as stated in the said notice of motion namely:

(a) cash amounting to RM11,075.70 and any increase to it in Maybank Bhd Savings Account number 114013215864 belonging to the first respondent at Maybank Bhd Kuala Lumpur branch which was seized on 13 March 2019;

(b) cash amounting to RM5,852.81 and any increase thereto at in CIMB Bank Bhd Savings Fixed Account number 5000138186 belonging to the first respondent at CIMB Bank Bhd Tunku Abdul Rahman branch, Kuala Lumpur which was seized on 13 March 2019;

(c) cash amounting to RM517.90 and any increase to it in the CIMB Bank Bhd Savings Account number 7002338023 belonging to the first respondent at CIMB Bank Bhd Jalan Tunku Abdul Rahman branch, Kuala Lumpur which was seized on 13 March 2019;

(d) cash amounting to RM790.21 and any addition to it in CIMB Bank Bhd's current statement number 8000648847 belonging to the second respondent at CIMB Bank Bhd's Putra World Trade Center branch, Kuala Lumpur which was seized on 10 April 2019;

(e) Honda HRV motor vehicle (A) with registration number WB3748R belonging to the first respondent ('the Honda HRV') which was seized on 2 January 2019; and

A (f) property with title number GRN 76444/M1/26/221, Parcel No A518, A865, A866, Lot 20001, Section 19, Kuala Lumpur City, Federal Territory owned by the first respondent whose address is 26–3, Suasana Bukit Ceylon, Persiaran Raja Chulan, Bukit Bintang, Kuala Lumpur ('the said apartment') belonging to the first respondent which was seized
B on 13 March 2019.

('the said properties').

[2] The appellant/applicant in the said notice of motion contended that the
C above three respondents' said properties were seized in relation to a criminal offence of smuggling migrants to Malaysia by obtaining professional work permits improperly by way of falsifying academic documents, education certificates and also work application documents under s 26A of the Anti-Trafficking in Persons and Anti-Smuggling of Migrants Act 2007 (Act
D 670) ('the ATIPSOM 2007') which is listed under the Second Schedule of the Anti-Money Laundering, Anti Terrorism Financing and Proceeds of Unlawful Activities Act 2001 (Act 613) ('the AMLATFPUAA 2001').

E **[3]** The following pleadings are pertinent:

(a) the said notice of motion dated 13 December 2019;

(b) the affidavit in support of TPR Muhammad Shukri bin Hussain affirmed on 12 December 2019;

F (c) the affidavit in support of Assistant Superintendent of Police Mohd Fitri Imran bin Mahadzir affirmed on 13 December 2019;

(d) the affidavit in support of Inspector Noor Azizah bt Che Mat affirmed on 13 December 2019;

G (e) the affidavit in opposition of the first and second respondents affirmed by the first respondent on 1 September 2020; and

(f) the affidavit in reply was filed by TPR Kee Shu Min affirmed on 14 September 2020 in response to the first respondent's reply affidavit.

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[4] The appellant/applicant further contended that they have successfully proven that the said properties were proceeds of an unlawful activity relating to the commission of an offence under s 4(1) of the AMLATFPUAA 2001 and the respondents have failed to prove otherwise.

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[5] The respondents in turn contended that the said properties could not be traced back to the predicate offence as the first and second respondents had received the said properties through their businesses, that the said properties

sought to be forfeited were not part of any pecuniary gains from any migrant smuggling and that there was no nexus between the predicate offence and the said properties.

[6] It should be noted that the first respondent had been tried by the same learned High Court judge ('learned HCJ') for an offence under s 26A of the ATIPSOM 2007 vide the Criminal Application No WA-45SOM-2–01 of 2019 wherein the learned HCJ ruled that the prosecution/applicant had failed to make out a prima facie case against the accused/the first respondent and he was acquitted. The charge was thereafter amended to s 12(1)(h) of the Passport Act 1966 and the accused/the first respondent pleaded guilty to such amended charge and was sentenced.

[7] The appellant/applicant's said notice of motion was heard before the learned HCJ who rejected the application on 27 January 2021 save for the item listed under para 1.5, which was cash amounting to RM221 in the CIMB Bank savings account belonging to the third respondent (Md Mithu). The item listed under para 1.5 was ordered to be forfeited as no one came forward to claim the said monies.

[8] Being aggrieved by the decision of the learned HCJ, the appellant/applicant appealed to this court.

[9] We heard the appeal on 25 January 22 and we unanimously allowed the appellant/applicant's appeal and our grounds are as follows.

[10] Parties shall be referred to their respective capacities in the High Court.

THE FINDINGS OF THE LEARNED HIGH COURT JUDGE

[11] In the High Court, the learned HCJ found, inter alia, as follows:

(a) that the applicant has failed to show the nexus between the offence under s 26A of the ATIPSOM 2007 or s 12(1)(h) of the Passport Act 1966 and the said properties intended to be forfeited;

(b) that the applicant's affidavits in support namely encls 2, 3 and 4 showed what are the properties seized and that in the deponent's belief, the said properties were obtained from the proceeds of unlawful activities without showing any linkages to the commission of the offence when considered in light of the mandatory requirements as provided under s 56(1) of the AMLATFPUAA 2001;

(c) that the applicant did not offer any evidentiary proof that the said properties sought to be forfeited were from the subject-matter of or was used in the commission of the offence of money laundering or that they are connected to the two predicate offences under s 26A of the ATIPSOM 2007 or s 12(1)(h) of the Passport Act 1966; and

(d) that the applicant has failed to satisfy the court on a balance of probabilities that the said properties intended to be forfeited are the subject matter or evidence relating to the commission of an offence under sub-s 4(1) of the AMLATFPUAA 2001, the proceeds of an unlawful activity, or the instrumentalities of an offence.

THE APPELLANT'S/APPLICANT'S CONTENTIONS

[12] Before us, the applicant contended, inter alia, as follows:

(a) that the said properties seized from the first and second respondent are properties from or related to an offense under s 4(1) of the AMLATFPUAA 2001;

(b) that, on the balance of probabilities, the said properties are obtained as a result of from the respondents' illegal activity by being involved with an offense under s 26A of the ATIPSOM 2007; and

(c) that on the balance of probabilities, the said properties are clearly and manifestly obtained as a result of illegal activities carried out by the first and second respondents, namely smuggling of Bangladeshi migrant citizens into Malaysia.

THE RESPONDENT'S CONTENTIONS

[13] The respondent, inter alia, contended as follows:

(a) that the applicant failed to prove the first element namely, the existence of a predicate offence under s 26A of the ATIPSOM 2007 as insufficient documentary evidence was tendered to prove that the first respondent had committed the said offence and for the offence under s 12(1)(h) of the Passports Act 1966, no evidence was tendered by the applicant at all to prove the offence;

(b) that the applicant made no attempt to identify the proceeds of the predicate offence and averments of the suspicious flow of money into the bank account is nothing more than a bare assertion unsubstantiated by documentary evidence. Hence the applicant had also failed to prove the second element;

(c) the third and final element to be proved by the applicant on the balance of probability is the manner the respondents have abetted or

participated in the commission of the predicate offence. Since the very basis of the predicate offence was not established, the applicant have failed to prove the manner in which the respondents have participated in such offence; and

(d) that learned HCJ had not erred in law and judgement when deciding that the applicant had failed to prove the elements under s 56(1) of the AMLATFPUAA 2001.

DUTY OF AN APPELLATE COURT

[14] It is a principle of law that when an appeal comes before an appellate court, the said appeal takes the form of a continuation of a trial and it is open to the appellate court to order or determine if the various findings of the trial court are correct (see *Public Prosecutor v Ma'Arif* [1969] 2 MLJ 65; *Ahmad Najib bin Aris v Public Prosecutor* [2009] 2 MLJ 613; [2009] 2 CLJ 800).

[15] In the course of carrying out its appellate functions, the Court of Appeal is empowered to conduct an evaluation exercise. Since an appeal is a continuation of proceeding by way of rehearing and an appellate court may subject the evidence to a critical re-examination. In *Public Prosecutor v Azilah bin Hadri & Anor* [2015] 1 MLJ 617; [2015] 1 CLJ 579, the Federal Court held as follows:

> We hold the view that even if the trial judge had failed to mention of any evaluation of common intention in his written grounds of judgment, the Court of Appeal, which in law reheard the case when exercising its appellate function, was empowered and also duty bound to carry out an evaluation exercise to determine whether common intention did exist.
>
> Here the Court of Appeal equally failed to do that. *An appeal is continuation of proceedings by way of rehearing and an appeal court may subject the evidence to a critical re-examination* (*Ahmad Najib bin Aris v Public Prosecutor* [2009] 2 MLJ 613; *Mohamad bin Deraman v Public Prosecutor* [2011] 3 MLJ 289.

[16] Reference is also made to the case of *Ahmad Najib bin Aris v Public Prosecutor* [2009] 2 MLJ 613; [2009] 2 CLJ 800, wherein the Federal Court held as follows:

> [20] As regards the first main ground of appeal raised by the appellant, *I am of the view that the Court of Appeal has the power to revise or re-evaluate all the evidence available as adduced by the prosecution. The Court of Appeal is in a position to do so in the present case even though the grounds of decision of the trial judge as appearing in the appeal records is found lacking in specific findings and with no reasons for the findings. In a case involving purely a question of fact, the Court of Appeal is free to determine whether or not the various findings of the trial court are correct* (see *Mohamed Mokhtar v Public Prosecutor* [1972] 1 MLJ 122). (Emphasis added.)

[17] It is an established principle that an appellant court should be slow to interfere with the finding of fact by a lower court as an appellate court does not have the advantage of seeing and hearing the witnesses and therefore of assessing their credibility (see *Public Prosecutor v Wan Razali Kassim* [1970] 2 MLJ 79; [1970] 1 LNS 121).

[18] Further guidance can be found in the Court of Appeal case of *Mohd Yusri bin Mangsor & Anor v Public Prosecutor and another appeal* [2014] 4 MLJ 875; [2014] 7 CLJ 897, where Zawawi Salleh JCA (as he then was) held as follows:

> [4] ... We have also scrutinised the records available before us. We are mindful that this is a factual based appeal. It is trite that an appellate court will be slow to interfere with the findings of facts and judicial appreciation of the facts by the trial court to which the law entrusts the primary task of evaluation of the evidence. However, there are exceptions. Where:
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> (a) the judgment is based upon a wrong premise of fact or of law;
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> (b) there was insufficient judicial appreciation by the trial judge of the evidence of circumstances placed before him;
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> (c) the trial judge has completely overlooked the inherent probabilities of the case;
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> (d) that the course of events affirmed by the trial judge could not have occurred;
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> (e) the trial judge had made an unwarranted deduction based on faulty judicial reasoning from admitted or established facts; or
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> (f) the trial judge had so fundamentally misdirected himself that one may safely say that no reasonable court which had properly directed itself and asked the correct questions would have arrived at the same conclusion, then an appellate court will intervene to rectify that error so that injustice is not occasioned (see *Perembun (M) Sdn Bhd v Conlay Construction Sdn Bhd* [2012] 4 MLJ 149; [2012] 1 LNS 1416 *Periasamy & Anor* [1995] 3 MLJ 395; [1996] 4 CLJ 545 (CA)).

OUR ANALYSIS AND CONCLUSION

[19] Bearing in mind the above principles distilled from the above cases, we will now deal with the applicant's appeal.

[20] The applicant's application was made under s 56(1) of the AMLATFPUAA 2001, which provides as follows:

> 56 Forfeiture of property where there is no prosecution
>
> (1) Subject to section 61, where in respect of any property seized under this Act there is no prosecution or conviction for an offence under subsection 4(1) or a

terrorism financing offence, the Public Prosecutor may, before the expiration of twelve months from the date of the seizure, or where there is a freezing order, twelve months from the date of the freezing, apply to a judge of the High Court for an order of forfeiture of that property if he is satisfied that such property is —

(a) the subject-matter or evidence relating to the commission of such offence;

(b) terrorist property;

(c) the proceeds of an unlawful activity; or

(d) the instrumentalities of an offence.

[21] As stated in the said notice of motion, the appellant's application was grounded on the fact that the said properties were the proceeds of money laundering, an offence under s 4(1)(a) as follows:

4 Offence of money laundering

(1) Any person whom —

(a) engages, directly or indirectly, in a transaction that involves proceeds of an unlawful activity or instrumentalities of an offence;

(b) acquires, receives, possesses, disguises, transfers, converts, exchanges, carries, disposes of or uses proceeds of an unlawful activity or instrumentalities of an offence;

(c) removes from or brings into Malaysia, proceeds of an unlawful activity or instrumentalities of an offence; or

(d) conceals, disguises or impedes the establishment of the true nature, origin, location, movement, disposition, title of, rights with respect to, or ownership of, proceeds of an unlawful activity or instrumentalities of an offence, commits a money laundering offence and shall on conviction be liable to imprisonment for a term not exceeding fifteen years and shall also be liable to a fine of not less than five times the sum or value of the proceeds of an unlawful activity or instrumentalities of an offence at the time the offence was committed or five million ringgit, whichever is the higher.

[22] 'Money laundering' is defined by s 3(1) of the AMLATFPUAA 2001 to mean an act of a person who:

(a) engages, directly or indirectly, in a transaction that involves proceeds of any unlawful activity;

(b) acquires, receives, possesses, disguises, transfers, converts, exchanges, carries, disposes, uses, removes from or brings into Malaysia proceeds of any unlawful activity; or

(c) conceals, disguises or impedes the establishment of the true nature, origin, location, movement, disposition, title of, rights with respect to, or ownership of, proceeds of any unlawful activity,

A where —

(aa) as may be inferred from objective factual circumstance, the person knows or has reason to believe, that the property is proceeds from any unlawful activity; or

(bb) in respect of the conduct of a natural person, the person without reasonable excuse fails to take reasonable steps to ascertain whether or not the property is proceeds from any unlawful activity.

B

[23] Thus, any person who engages in a transaction that involves 'proceeds of any unlawful activity' commits the offence of money laundering. As to what C 'proceeds of an unlawful activity' means, it has been given the following definition by s 3(1) of the AMLATFPUAA 2001:

any property derived or obtained, directly or indirectly, by any person as a result of any unlawful activity.

D

[24] 'Unlawful activity' means:

any activity which is related, directly or indirectly, to any serious offence or any foreign serious offence

E **[25]** 'Serious offence' on the other hand is defined to mean:

(a) any of the offences specified in the Second Schedule of AMLATFPUAA 2001

(b) an attempt to commit any of those offences; or

F

(c) the abetment of any of those offences.

[26] 'Unlawful activity' is any activity that is 'related to a serious offence'. In the present case, the respondents was alleged to have committed a criminal G offence of smuggling migrants to Malaysia by obtaining professional work permits improperly by way of falsifying academic documents, education certificates and also work application documents which is an offence under s 26A of the ATIPSOM 2007 and the first respondent have pleaded guilty to an offence under s 12(1)(h) of the Passport Act 1966. Both offences are stated in H the Second Schedule to AMLATFPUAA 2001.

[27] Going by the language of s 56(1) of the AMLATFPUAA 2001, there is no requirement that a conviction under s 4(1)(a) of the AMLATFPUAA 2001 or a terrorism financing offence must first be obtained before the applicant I could apply for a forfeiture order. What is required is for the public prosecutor to satisfy himself that the seized property falls under paras (a) or (b) or (c) or (d) of s 56(1) of the same Act.

[28] The duty of a High Court judge upon receiving such application by the

public prosecutor is prescribed by s 56(2) of the AMLATFPUAA 2001, as follows:

> (2) The judge to whom an application is made under subsection (1) shall make an order for the forfeiture of the property if he is satisfied —
>
> (a) that the property is —
>
> (i) the subject-matter or evidence relating to the commission of an offence under subsection 4(1) or a terrorism financing offence;
>
> (ii) terrorist property;
>
> (iii) the proceeds of an unlawful activity; or
>
> (iv) the instrumentalities of an offence; and
>
> (b) that there is no purchaser in good faith for valuable consideration in respect of the property.

[29] The trial judge's principal concern in an application under s 56(1) of the AMLATFPUAA 2001 is with the legal standing of the property, not the guilt or otherwise of any person under s 4(1) of the AMLATFPUAA 2001. He must order for forfeiture if the property falls under paras (i) or (ii) or (iii) or (iv) of sub-s (2)(a) of the same Act.

[30] Guidance can be found in *Noor Ismahanum Mohd Ismail v Public Prosecutor* [2019] 2 MLJ 536; [2018] 10 CLJ 597, where the Court of Appeal held, inter alia, as follows:

> [15] The judge's primary concern in an application under s 56(1) is with the legal status of the property, not the guilt or otherwise of any person under s 4(1)(a) of the AMLATFA. He must order for forfeiture if the property falls under para (i) or (ii) or (iv) of sub-s (2)(a).

[31] In the context of the present case, what the learned HCJ had to determine was whether the said properties was 'the proceeds of an unlawful activity' within the meaning of para (a)(iii) of s 56(2) of the AMLATFPUAA 2001 and not whether any person had been convicted or acquitted of an offence under s 4(1)(a) of the AMLATFPUAA 2001 although the fact of such conviction or acquittal was relevant under s 76 of the same Act.

[32] In determining whether the property is 'the proceeds of an unlawful activity', the standard of proof to be applied by the judge is the civil standard of proof, ie proof on the balance of probabilities, as stipulated by ss 56(4) and 70(1) of the AMLATFPUAA 2001.

[33] As to the question when does a person discharge his civil standard of proof, Lord Denning in *Miller v Minister of Pensions* [1947] 2 All ER 372

explained:

> If the evidence is such that the tribunal can say 'we think it more probable than not' the burden is discharged but if the probabilities are equal, it is not.

[34] Thus, if the judge in an application under s 56(1) of the AMLATFPUAA 2001 finds it to be more probable than not that the property is derived from a transaction that involves 'the proceeds of an unlawful activity', that will be sufficient for him to make an order of forfeiture under s 56(2) of the AMLATFPUAA 2001. There is no need for him to be satisfied 'beyond any reasonable doubt' that the property is derived from an 'unlawful activity'.

[35] To recapitulate, 'unlawful activity' 'any activity which is related, directly or indirectly, to any serious offence or any foreign serious offence' and 'proceeds of an unlawful activity' means 'any property derived or obtained, directly or indirectly, by any person as a result of any unlawful activity. Migrant smuggling is a 'serious offence' by definition and is therefore an 'unlawful activity' for the purposes of s 56(2)(a)(iii) of the AMLATFPUAA 2001.

[36] If any property is derived from any unlawful activity such as the criminal offence of smuggling migrants to Malaysia by obtaining professional work permits improperly by way of falsifying academic documents, education certificates and also work application documents, it must be forfeited, irrespective of whether any person has been convicted or otherwise of the offence of money laundering under s 4(1)(a) of the AMLATFPUAA 2001.

[37] In our considered view, once the applicant produced prima facie proof that the said properties were acquired or from the proceeds of illegal activities, the burden shifted to the claimant to show to the contrary by virtue of s 103 of the Evidence Act 1950 ('the Evidence Act') which provides:

> 103 The burden of proof as to any particular fact lies on that person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.

[38] In so far as the learned HCJ's findings in paras 9 to 12 of his grounds of judgment where he held that the applicant did not offer any evidentiary proof that the properties sought to be forfeited were from the subject matter of or was used in the commission of the offense of money laundering or that they are connected to the two predicate offences under s 26A of the ATIPSOM 2007 and s 12(1)(h) of the Passport Act 1966, we are of the considered view that this is erroneous.

[39] The following evidences further showed that illegal activities such as the commission of a criminal offence of smuggling migrants to Malaysia by

obtaining professional work permits improperly by way of falsifying academic documents, education certificates and also work application documents under s 26A of the ATIPSOM 2007 by the first and second respondents are as follows:

(a) paras 8 until 18 of the affidavit in support of Assistant Superintendent of Police Mohd Fitri Imran bin Mahadzir affirmed on 13 December 2019;

(b) the written statement of the first respondent dated 29 November 2018 (exh FIM2) recorded pursuant to s 34 of the ATIPSOM 2007;

(c) the written statement of Md Mithu dated 5 December 2018 (exh FIM4) recorded pursuant to s 34 of the ATIPSOM 2007;

(d) the written statement of Mohamad Mohasin (exh FIM5) dated 6 December 2018 recorded pursuant to s 34 of the ATIPSOM 2007; and

(e) the written statement of Mohammad Zaidi bin Zawawi dated 22 October 2019 (exh NAC19) recorded pursuant to s 34 of the ATIPSOM 2007.

('the said affidavit and written statement')

[40] In *Dato' Sri Mohd Najib bin Hj Abd Razak v Public Prosecutor* [2022] 1 MLJ 137; [2021] 1 LNS 2080, the Court of Appeal agreed with the finding by the High Court held as follows:

> [1023] The definition of unlawful activity is therefore not confined only that the activity which constitutes a predicate offense (the serious offense as defined in the Act) such as the abuse of position offense or the CBT offense but also any activity which is of such nature, or occurs in such circumstances that it results in or leads to the commission of any serious offense.
>
> [1024] *What this therefore means is that an unlawful activity need not necessarily be only the predicate offense itself, but can separately be an activity which results in the predicate offense. It follows that even though in all cases of prosecution under s 4(1) of the AMLATFPUAA, the unlawful activity must be proven, it does not mean that in all cases, the predicate offense itself must be proven to have been committed. Depending on the charges and the evidence adduced at trial, it is enough too that an activity that leads to the commission of the offense be established.* (Emphasis added.)

[41] In so far as the respondents' contention that the said properties could not be traced back to the predicate offence as the first and second respondents had received the said properties through his business, that the said properties sought to be forfeited were not part of any pecuniary gains from any migrant and that there was no nexus between the predicate offence and the said properties, we are unable to accede to such contentions for the following reasons:

(a) the first respondent has been investigated for an offence under s 26A of

A the ATIPSOM 2007 and was convicted of an charge under s 12(1)(h) of the Passport Act 1966;

(b) evidence showed that the first respondent's income was only RM9,000 per month and the second respondent was in the business of business dealings ie suppliers/wholesalers' textile goods and goods general, building washing services and construction-related businesses;

(c) the second respondent's incomes were substantially in the form of cash;

(d) evidence adduced showed that the purchases of the said apartment and the said Honda HRV were bought substantially in the form of cash generated and from by the first and second respondents; and

(e) since the first respondent cannot reasonably and adequately explain the source and frequent flow of cash deposits into his and the second respondent's bank accounts and since the first respondent was investigated for money laundering and convicted under s 12(1)(h) of the Passport Act 1966, it would reasonable to assume that the cash deposits were proceeds from illegal activities and such proceeds were utilised to purchase and/or acquire the said properties.

[42] As regards the other contention that the applicant has failed to prove on the balance of probability, the manner that the respondents have abetted or participated in the commission of the predicate offence, we are again unable to accede to this contention of the respondent. As stated earlier, the first and second respondents were investigated for offences under s 26A of the ATIPSOM 2007, from the evidence in the said affidavit and written statements, we find that the first respondent was involved in such illegal activities such as smuggling migrants to Malaysia by obtaining professional work permits improperly by way of falsifying academic documents, education certificates and also work application documents and this is confirmed by the immigration officers namely the said Mohammad Zaidi bin Zawawi and Mohd Yuki bin Ibrahim who dealt with him. Thus, we are of the considered view that the applicant have successfully proved the manner in which the respondents have participated in such unlawful activities and arising therefrom, obtained monies which were used to purchase the said properties or deposited in the bank accounts.

[43] Further evidence comes from the said affidavit in support of Inspector Noor Azizah bt Che Mat affirmed on 13 December 2019 together with all the exhibits showed that the frequency of the flow of cash monies into the bank accounts belonging to the first and second respondents as can be seen in the Maybank bank statements belonging to the first respondent (pp 127–200 Vol 3(1) RR, pp 202–243 Vol 3(2) RR), in the CIMB bank statements

belonging to the first respondent (pp 351–371 Vol 3(2) RR) and the second respondent's CIMB bank statements (pp 423–503 Vol 3(3) RR). A

[44] We are of the considered view that the frequency of the flow of cash monies in to the first and second respondents' various bank accounts without any reasonable explanation by them raised a very real suspicion that the cash monies are from illegal activities carried out by the first respondent and the second respondent. B

[45] Further, the said written statement of Mohammad Zaidi bin Zawawi dated 22 October 2019 (exh NAC19) stated that the payment for illegal activities involving the unlawful entry of Bangladeshi migrants was also paid in cash by the Bangladeshi citizens to the first respondent and the first respondent also paid them in cash to facilitate the entry of the migrants to Malaysia by way of forging documents. C D

[46] Further, in the first respondent's affidavit, he affirmed that his bank accounts namely, MBB Account No 5864, CIMB Account No 8186 and CIMB Account No 8023 were used for the receipts there is no credible evidence adduced by the first respondent, to support this other than the Inland Revenue Board statements, his passport and his temporary work visit. The first respondent's has failed to explain the frequent and suspicious inflow or deposits of cash monies into the various bank accounts. E

[47] Based on the first respondent's affidavit, he asserted that the second respondent's bank account which is CIMB Account No 8847, is for business dealings ie suppliers/wholesalers' textile goods and general goods, building washing services and construction-related businesses. However, the first respondent still failed to explain the very frequent and suspicious cash deposit transactions into this bank account. Furthermore, the results of the investigation showed that on 8 December 2015 there was a transfer money through an ATM machine from one, Md Nurul Islam into this account amounting to RM10,000 with the remarks/entry 'passport'. This showed that there issomething suspicious, bearing in mind that the second respondent's business has nothing to do with passport matters. F G H

[48] The first respondent is only a director of the second respondent and based on the Inland Revenue Board statements, (pp 706–715 Vol 3(4) RR), they clearly showed that his salary was around RM108,000 to RM113,400 per year which worked out to be around RM9,000 per month only. I

[49] The results of the investigation into the said Honda HRV which formed part of the said properties showed that the first respondent had purchased the said Honda HRV for the sum of RM117,968.80 on 24 June 2015, made an

advance payment of RM49,068.80 and took out a vehicle loan with Malayan Banking Bhd amounting to RM68,000. The hire purchase agreement between the first respondent and MBB is for the amount of RM77,044 for 60 months with a monthly payment of RM1,285. However, further investigation revealed that on 7 June 2016, the first respondent made a cash settlement of the vehicle loan amounting to RM55,709.

[50] This showed that the first respondent has shortened the loan repayment period for the said Honda HRV from 60 months to 12 months only which is highly suspicious, considering that the first respondent is only a director of the second respondent with a monthly salary of approximately RM9,000 only with no other side income. The first respondent also never showed evidence that the purchase of the said Honda HRV was also the result of his savings.

[51] Further, evidence of purchase of the said apartment which also formed part of the said properties showed that the first respondent had purchased the said apartment on 20 July 2016 for the sum of RM1,445,050. The first respondent was given 5% discount which amounting to RM72,252.50, from the purchase price. A sum amounting to 10% of the purchase price was paid as deposit and part payment amounting to RM136,505,00 by way of cash. The first respondent had earlier paid RM8,000 as booking fee then took out a housing loan with MBB for the purchase of the said apartment amounting to RM500,000 for ten years with a monthly repayment of RM5,170. However, evidence revealed that the first respondent had fully paid up the housing loan for the said apartment at the end of 2017, amounting to RM450,000. The difference between the loan amount and the outstanding purchase price amounting to some RM800,000 was paid in cash by transfer of money from the bank accounts of the first and second respondents (see p 116 Vol 3(1) RR).

[52] This also showed that the first respondent has shortened the repayment term of the housing loan of the said apartment from a period of ten years to a period of less than two years only, considering that the first respondent is only a director for the second respondent with a monthly salary of approximately RM9,000 only. The first respondent has also never produced any evidence that the said purchase of the said apartment also is the result of the sale of his previous house namely, the Awana Puri Condominium.

[53] Based on the said affidavit and written statements and the said affidavit in support of Inspector Noor Azizah bt Che Mat affirmed on 13 December 2019, we are of the considered opinion that the applicant has successfully proved, on the balance of probabilities, that the said properties was acquired as a result of illegal activities under s 26A of the ATIPSOM 2007 and s 12(1)(h) of the Passport Act 1966 committed by the first and second respondents.

[54] From the evidence, we are of the considered view that there has been illegal activities committed by the first and second respondents. Firstly, the first respondent was convicted for an offence under s 12(1)(h) of the Passport Act 1966 which indirectly meant that the first respondent was guilty of an offense related to illegal activities. Section 3 of the AMLATFPUAA 2001 which is the interpretation section defines 'serious offence' as meaning 'any of the offences specified in the Second Schedule' and an offence under s 12(1) of the Passport Act 1966 is one of the offences specified in the Second Schedule of the AMLATFPUAA 2001. Secondly, the affidavit evidence also showed that the first and second respondents have committed the criminal offence of smuggling migrants to Malaysia by obtaining professional work permits improperly by way of falsifying academic documents, education certificates and also work application documents under s 26A of the ATIPSOM 2007.

OUR DECISION

[55] We are of the considered opinion that the learned High Court judge made errors which warranted appellate intervention in the applicant's appeal. More often than not, an appellate court will not reverse a trial court's findings of facts unless that finding was 'plainly wrong'.

[56] In the light of our above findings, we are of the respectful view that there are merits in the applicant's appeal and we unanimously allow the applicant's appeal.

[57] In the premises, we order that the forfeiture of the said properties to the Government of Malaysia pursuant to s 56(1) of Act 613.

[58] The decision of the learned High Court judge of 27 January 2021 is set aside.

Appeal allowed and High Court's decision set aside.

Reported by Dzulqarnain Ab Fatar